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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 500

STATE OF WASHINGTON,
Petitioner,

vs.

COLUMBIA STEEL COMPANY,
Respondent.

ANSWER TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

ROBERT H. EVANS,
WILLIAM G. McLAREN,
GEORGE V. POWELL, of
EVANS, McLAREN, LANE,
POWELL & BEEKS,
1121 Dexter Horton Building, Seattle 4, Washington,
WALTER SHELTON,
The San Francisco Bank Building,
405 Montgomery Street, San Francisco 4, California,
Attorneys for Respondent.

Subject Index

	Page
Questions presented	1
Summary of facts	2
Reasons assigned for allowance of the writ	2
This case presents no new federal question. The importing state has no greater right to tax interstate commerce than the exporting state	5
This Washington statute has been construed as discriminatory against interstate commerce by this court and is followed by the Washington court in the decision here sought to be reviewed	7
Only a small part of the interstate commerce here taxed in toto took place within the jurisdiction of Washington and there is no apportionment	11
Further, the gross receipts tax which the Washington Tax Commission seeks to impose is forbidden regardless of lack of apportionment	13
The tax cannot be sustained on the theory of the "separate taxable event"	13
The cases relied on by petitioner are either not in point or are not in accord with previous more recent decisions of this court	14
The petition for certiorari is presented too late	15
Conclusion	17

Table of Authorities Cited

	Pages
Adams Mfg. Co. v. Storen, 304 U.S. 307	6
Aero Mayflower Transit Co. v. The Board of R.R. Comrs., 332 U.S. 495	7
Allied Mills v. Dept. of Treasury, 318 U.S. 740	3, 14
American Mfg. Co. v. St. Louis, 250 U.S. 459	10
Bowman v. Continental Oil Co., 256 U.S. 642	6
Cole v. Violette, 319 U.S. 581	16
Columbia Steel Company v. Washington, 30 Wn. (2d) 658	5, 8
Department of Banking v. Pink, 317 U.S. 264	16
Drury the Tailor v. Jenner, 12 Wn. (2d) 508	4
Freeman v. Hewit 329 U.S. 249	3, 6, 10, 12, 13
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434	2, 4, 5, 7, 9
Hans Rees' Sons v. North Carolina, 283 U.S. 123	12
Indiana Gross Income Tax Division v. Strauss, 335 U.S. 860	15
International Harvester Co. v. Dept. of Treasury, 322 U.S. 340	3, 14
Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 492	13
James v. Dravo Contracting Co., 302 U.S. 154	12
Joseph v. Carter & Weeks, 330 U.S. 422	3, 13, 14
Market Street R. Co. v. R.R. Commissioner of Calif., 324 U.S. 548	16
McLeod v. Dilworth, 322 U.S. 327	12
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33	15
Mower v. Fletcher, 114 U.S. 127	16
Nippert v. Richmond, 327 U.S. 416	6, 13, 14

Pages

Puget Sound Stevedoring Company v. State Tax Commission, 302 U.S. 90 4

Rio Grande Western R. Co. v. Stringham, 239 U.S. 44.... 16

Tippecanoe County v. Lucas, 93 U.S. 18 16

Underwood Typewriter Company v. Chamberlain, 254 U.S. 113 ..... 3, 5

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ANSWER TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

We think the petition is without merit and that it comes too late.

Question presented.

Respondent suggests that the question presented, as set forth by petitioner, should be amended to point out that this Court has heretofore decided that the Washington Business and Occupation Tax is of such character that its application to interstate commerce violates Article I, Section 8, of the Constitution of the United States.

Summary statement.

The summary of the facts of this case, as set forth in the petition and in petitioner's brief, omits certain matter considered to be necessary, as follows:

The local business transacted by the respondent in the State of Washington during the years involved consisted of the sale of lightweight steel products in small quantities. (R. 33.) The interstate business, on which the contested tax is based, involved sales of steel products of large weights and sizes in large quantities. (R. 33, 34.) All of the materials sold in interstate commerce were shipped by common carrier from the states of manufacture into the State of Washington on straight bills of lading to the customers in Washington. (R. 34, 35.) Some of the interstate business was done upon contracts negotiated, made and concluded outside the State of Washington and the remainder was done upon contracts negotiated, made and concluded by sales personnel in Washington in conjunction with employees and officers outside the State. (R. 35.) Substantially all payments of the sales price were made in San Francisco. (R. 35.)

Reasons assigned for allowance of the writ.

Respondent desires to answer each of the reasons assigned for issuance of the Writ.

1. The ruling of the Washington Supreme Court that the tax here levied is discriminatory is predicated on this Court's decision in *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939) which followed and applied the rule adopted by this Court for

more than a century. In all the decisions of this Court allowing a state to levy a "single tax worth" on interstate commerce, it has followed *Underwood Typewriter Company v. Chamberlain,* 254 U.S. 113 (1920) and has uniformly held that a state must base its tax on that part of the commerce which takes place within its jurisdiction and that a state will not be allowed to tax any part thereof which is conducted in other states. Hence, there must be apportionment.

2. We agree the decision here under consideration is in conflict with *Allied Mills v. Department of Treasury,* 318 U.S. 740 and *International Harvester Company v. Department of Treasury,* 322 U.S. 340, but those cases are no longer controlling in view of the subsequent decisions of this Court.

3. We admit that *Allied Mills v. Department of Treasury* and *International Harvester Company v. Department of Treasury* have not only been cast in doubt by the decision in *Freeman v. Hewit,* 329 U.S. 249, but we think, have been superseded altogether. We can see no reason for a further consideration and expression of opinion from this Court. *Freeman v. Hewit* and other cases subsequently decided have clearly vacated the ruling of this Court relied on by petitioner. As was said by Mr. Justice Douglas in dissenting from the majority opinion in *Joseph v. Carter & Weeks,* 330 U.S. 422, 444:

> "The failure of the court (majority) to adhere to the philosophy of our recent cases corroborates the impression some of us have that Freeman v. Hewit marked the end of one cycle under the commerce clause and the beginning of another."

4. This case and the companion case cannot be regarded as exceptionally important or as test cases in any sense of the word. The Washington statute here involved, prior to amendment, in its present form, has been before this Court a number of times, and each time it has been held invalid as to interstate commerce. See *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 334 (1939); *Puget Sound Stevedoring Company v. State Tax Commission,* 302 U.S. 90 (1937). In these cases, this Court held the Washington statute invalid and discriminatory as against interstate commerce for lack of apportionment, and because the state was undertaking to tax that portion of a single unitary activity, not carried on within the state or subject to its jurisdiction. Thereafter, there was no attempt to tax interstate commerce under the statute here involved, and after the decision in *Drury the Tailor v. Jenner,* 12 Washington (2d) 508 (1943), the Washington legislature saw fit to amend this statute exempting manufacturers from the payment of the wholesale tax as pointed out in the decision. Then, in 1945, the Tax Commission, for the first time after the last mentioned decisions of this Court, undertook to levy the tax here involved. (Petition, p. 5.) After this litigation was instituted, the Washington Tax Commission suspended the rule under which it sought to collect the tax here in controversy.

5. The state put up the same argument here relied on to induce this Court to grant certiorari, all to the effect that the state's revenues were in jeopardy, but the report of the Washington Tax Commission for the

years 1943, 1944, 1945 and 1946 shows that the total tax, both local and interstate, on wholesale activities did not in any year exceed $2,500,000.00, only a small part of which involved interstate commerce. As already pointed out, the state of Washington for years did not undertake to collect any taxes on interstate commerce after the decision of this Court in *Gwin, White & Prince, Inc. v. Henneford* until it promulgated its rule in 1945, going back to 1943, as far as the Statute of Limitations would permit, to wit, three years, and then rescinded that rule after this litigation was instituted. What happens in other states to gross receipts taxes is a wholly extraneous matter. The Indiana gross receipt taxes have been litigated and, we think, settled. The only other state that we know of with a tax statute similar to Washington is West Virginia. Since the decision of *Underwood Typewriter Company v. Chamberlain,* nearly all the states have provided for apportionment, and thus limited the tax to the jurisdiction of the state.

The opinion of the Supreme Court of Washington, 30 Wn. (2d) 658 (May 6, 1948) (R. 9) is in full consonance with the stream of decisions of this Court and discloses quite fully the issues involved.

This case presents no new Federal question.

The importing state has no greater right to tax interstate commerce than the exporting state.

This Court has passed many times upon the proposition that an importing state has no greater or better right to tax the privilege of carrying on interstate

commerce than an exporting state. See all the "Drummer" cases decided by this Court concluding with *Nippert v. Richmond,* 327 U.S. 416. See, also, *Bowman v. Continental Oil Company,* 256 U.S. 642.

We desire to call the Court's attention to *Freeman v. Hewit,* 329 U.S. 249. In his concurring opinion, Mr. Justice Rutledge settled the proposition that the importing state, such as Washington in this case, has no better right to tax interstate commerce than the exporting state, and pointed out that the exporting state was not concluded by the decisions of this Court from taxing at all, but that the exporting state could levy a tax provided it was not discriminatory and was properly apportioned.

In that case, in his concurring opinion, he says:

> "To deprive either state, whether of origin or market, of the power to levy the tax, permitting the other to do so has the *vice* of allowing one state to tax but denying this power to the other." 329 U.S. 279. (Emphasis supplied.)

In *Adams Mfg. Co. v. Storen,* 304 U.S. 307, 314, it is said:

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

Mr. Justice Rutledge also said in *Freeman v. Hewit,* supra:

"The Adams opinion gives no reason for believing that the application of the tax would not have been sustained if either of the two elements vitiating it had been absent. On the contrary, the fair, indeed the necessary, inference from the language and reasons given is that the tax would not have been voided if there had been no danger of multiple state taxation or if the tax had been apportioned so as to eliminate that risk." 329 U.S. 260.

In that opinion he further says:

"The Adams decision, of course, made no direct ruling upon an actual tax laid by the State of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of origin, encountered." Footnote 40, 329 U.S. 278.

This Washington statute has been construed as discriminatory against interstate commerce by this Court and is followed by the Washington Court in the decision here sought to be reviewed.

In keeping with the previous decisions of this Court, the Washington State Supreme Court in this case determined that the Washington statute is discriminatory against the interstate commerce here involved. There is no room for argument as to the interpretation of the statute. The state Court's interpretation of its statute is usually followed by this Court. See *Aero Mayflower Transit Co. v. The Board of Railroad Commissioners,* 332 U.S. 495, 499-500, where it is said:

> "The rule is too well settled to permit of question that this Court not only accepts, but is bound by the construction given to state statutes by state courts."

We think it appropriate to quote from the Washington opinion at this point.

> "In passing upon that question in Gwinn, White & Prince, Inc. v. Henneford, 305 U.S. 434 * * * the Supreme Court of the United States made the following holding: 'But it is enough for present purposes that under the commerce clause in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce'." 30 W. (2d) 662. (R. 12.)

Dealing more particularly with the amendment of the statute, subsequent to this Court's decisions cited above, which exempts Washington manufacturers from the payment of any tax on their wholesale activities, the opinion further states:

> "We must interpret the statute as passed by the legislature. In our opinion, the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in Sec. 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. 30 Wn. (2d) 664. (R. 14.)
>
> * * * * * * *
>
> "Regardless of the uncertainty on the question of what types of state taxation on interstate commerce are allowable, it may be definitely stated

that any tax which places interstate commerce at a disadvantage in competition with local commerce, is prohibited by the Federal constitution." (R. 12.)

As already stated, this Washington statute has been before this Court a number of times, and when an attempt has been made to have it support a tax on interstate commerce, it has always been held invalid. The last case decided by this Court invalidating a levy on interstate commerce was *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939).

Petitioner's brief proceeds on the theory that the Washington decision holding the statute discriminatory is based solely on the amendment exempting manufacturers from the tax. The brief entirely overlooks the provisions of the opinion quoting from and relying on *Gwin, White & Prince, Inc. v. Henneford,* which decision held the statute discriminatory as against interstate commerce before the amendment exempting manufacturers was passed.

The Washington statute was held discriminatory by the Washington Court and by the decisions of this Court above cited independently of the amendment here involved. That amendment not only continued, but increased the discriminatory character of the Washington statute against interstate commerce.

The "single tax worth" allowed by the decisions of this Court on interstate commerce does not mean that interstate commerce can be charged with all taxes with which local taxpayers are charged with respect

to the local phases of their business, but is limited to what the local taxpayer is required to pay on the same activity for which interstate commerce is taxed. Here the local manufacturer is excused altogether from the payment of any tax on the same wholesale activity which is charged against interstate commerce.

The discrimination exists in the *possibility* (and not necessarily the actuality) of the imposition of greater taxes upon interstate commerce than are imposed on local intrastate business. The tax statute of the State of Washington cannot be considered separate and apart from the taxing power of the other states.

As was said in *Freeman v. Hewit,* 329 U.S. 249:

> "If another state has taxed the same interstate transaction the burdensome consequences to interstate trade are undeniable. But that for the time being, only one state has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."

Any state may impose a tax on the privilege of manufacturing, measured by the gross receipts from shipments in interstate commerce. *American Mfg. Co. v. St. Louis,* 250 U.S. 459.

The respondent may be required to pay such a tax in the states from which it ships goods to Washington, which tax is comparable to the tax imposed by

the State of Washington upon its own manufacturers under the statute considered here.

The discrimination against interstate commerce lies in the fact that the State of Washington imposes a second tax measured by the identical gross receipts upon the respondent as a wholesaler, while Section 6 of the statute exempts the local manufacturer from this second tax.

The petitioner's brief seems to recognize that this discrimination exists, but seeks to justify the admitted discrimination against interstate commerce as desirable for local tax administration. It is not within the power of a state to simplify a local tax problem at the expense of the protection afforded to interstate commerce by the Constitution.

Only a small part of the interstate commerce here taxed in toto took place within the jurisdiction of Washington and there is no apportionment.

The undisputed facts in this case are set forth in the amended complaint embodied in the transcript on appeal. The admitted facts in the amended complaint make it clear that the title passed before any of the goods of the taxpayer arrived in Washington and that the only part of the interstate commerce performed in Washington was the delivery by the common carrier to the customer in Washington. The Uniform Sales Act which was in force in Washington and all the states involved in this litigation specifically provides that under the facts here set forth and admitted, title passed to the purchaser when the goods were delivered to the common carrier under a straight bill of lading.

Under the admitted facts, 40% of the sales involved were made and negotiated outside Washington and the remainder were negotiated by officers outside the state in conjunction with local salesmen in Washington. All payments of the sales price were made in San Francisco. It is admitted that taxpayer paid an apportioned privilege tax on the interstate commerce here involved in California and Utah. This Court has many times upheld the California tax. The Utah tax which taxpayer paid on this particular interstate commerce is the full equivalent of the California tax and is apportioned to apply solely to that portion of the interstate commerce transpiring in that state. This Court, speaking through Justice Rutledge, has decided:

> "It is obvious that an apportioned tax laid by the forwarding state, taken in conjunction with an unapportioned one levied by the state of the market, would produce the effect of multiple state levies to the extent of the apportioned tax." (Note 44, concurring opinion Freeman v. Hewit, 329 U.S. 283.)

As pointed out in *Hans Rees' Sons v. North Carolina,* 283 U.S. 123; *James v. Dravo Contracting Co.,* 302 U.S. 134; and *McLeod v. Dilworth,* 322 U.S. 327, a state has no power to impose a tax on activities conducted outside the state. The interstate commerce here involved consisted of a unitary business conducted in several states and it was not in the power of Washington to claim the whole thereof and levy a tax thereon as it undertook in this case to do.

Further, the gross receipts tax which the Washington Tax Commission seeks to impose is forbidden regardless of lack of apportionment.

Aside from the question of necessity for apportionment this Court has decided a great many times that it is the purport and intent of the commerce clause in the constitution that the States are not authorized to tax interstate commerce at all so as to impose a direct tax or burden on such commerce. See Mr. Justice Frankfurter's opinion in *Freeman v. Hewit,* 329 U.S. 249; *Nippert v. Richmond,* 327 U.S. 416; *Joseph v. Carter & Weeks Stevedoring Co.,* 330 U.S. 422, and the reasoning of the four dissenting Justices in *Inter-State Oil and Pipe Line Co. v. Stone,* 337 U.S. 492.

The tax cannot be sustained on the theory of the "separate taxable event".

In *Nippert v. Richmond,* supra, it was said:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is con-

> nected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result.
>
> "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

If the taxable event is made the basis for imposing an unapportioned tax on the whole interstate commerce by one state, another state would have the same right and a multiple tax on interstate commerce would result, which is not permitted and which is why *International Harvester Co. v. Dept. of Treasury,* 322 U.S. 340, and *Allied Mills v. Dept. of Treas.,* 318 U.S. 740, so heavily relied on by petitioner in this case have been superseded by the later decisions of this Court.

The cases relied on by petitioner are either not in point or are not in accord with more recent decisions of this Court.

On page 24 of petitioner's brief, a number of cases are cited dealing with sales and use taxes with the idea that those cases should be treated as controlling here. In the more recent cases of *Freeman v. Hewit,* 329 U.S. 249; *Joseph v. Carter & Weeks,* 330 U.S. 422; and *Nippert v. Richmond,* 327 U.S. 416, the dissenting opinions have cited those cases and argued at length their application to interstate commerce, but all the late decisions of this Court have consistently

held those cases inapplicable to the issues here involved.

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 84 L. Ed. 565, and the use tax cases are not in point here because the tax there is not imposed on interstate commerce but on the consumer after the commerce between the states has been completed.

For recent action of this Court upon certiorari involving the Indiana statute similar to the Washington statute see *State of Indiana, Gross Income Tax Division, Petitioner v. Strauss, Respondent,* 335 U.S. 860, where this Court denied certiorari to the Indiana Supreme Court.

We think the foregoing sufficiently answers the petition here and that it is unnecessary to discuss the merits further.

The petition for certiorari is presented too late.

We are of opinion that the petition applying for certiorari filed herein subsequent to December 3rd comes too late. The last judicial act in this case occurred on September 3, 1949, when the Supreme Court rendered and filed its decision upholding the judgment of the trial Court, and its judgment was entered in its records on that day. As stated on page 4 of the petition the opinion of the Washington Supreme Court was filed on September 3, 1949. The filing is shown on the transcript sent to this Court, although not specifically noted on the printed record. The purported judgment set forth on page 46 of the printed record was merely a journal entry by the clerk, and, of course,

adds nothing to the opinion filed September 3rd, which concludes, "The judgment appealed from is affirmed upon appellant's appeal and is also affirmed upon respondent's cross-appeal. No costs will be allowed in this Court to either party." That, in our opinion, was the judgment of the Supreme Court. The appeal from the Superior Court did not operate as a *supersedeas* of the judgment of the trial Court. Under the law of Washington, a judgment can be enforced pending appeal, and if it is reversed, restitution must be made. No stay of execution was entered in this case until on October 3rd. The last judicial act of the Courts of Washington occurred on September 3rd when the Supreme Court rendered its decisions signed by all of the nine judges. Anything done after that was purely ministerial and in no way affects the finality of the judgment of the Supreme Court made and entered on September 3, 1949.

See *Market Street R. Co. v. R. Coms. of California,* 324 U.S. 548; *Dept. of Banking v. Pink,* 317 U.S. 264; *Cole v. Violette,* 319 U.S. 581; *Rio Grande Western R. Co. v. Stringham,* 239 U.S. 44; *Mower v. Fletcher,* 114 U.S. 127; *Tippecanoe County v. Lucas,* 93 U.S. 18. In all those cases cited nothing but ministerial acts remained to be done after the highest state Court had rendered and recorded its decision.

The California case and the cases there cited are, we think, controlling. The making and filing of the opinion by the entire Supreme Court on the 3rd day of September, 1949, effectually concluded the judicial aspects of the case and the filing of that opinion was all that was required by the Federal statute.

The laws governing the Supreme Court of Washington and California are substantially identical which adds force to the California decision above cited here.

Conclusion.

In conclusion, we submit there are no grounds for certiorari in this case and that the petition filed herein is too late.

Dated, January 11, 1950.

ROBERT H. EVANS,
WILLIAM G. MCLAREN,
GEORGE V. POWELL, of
EVANS, MCLAREN, LANE,
POWELL & BEEKS,
WALTER SHELTON,
Attorneys for Respondent.